Ontario Municipal Board
Commission des affaires municipales
de l'Ontario

ISSUE DATE: September 18, 2014 **CASE NO(S).:** PL110080

PROCEEDING COMMENCED UNDER subsection 17(36) of the *Planning Act*, R.S.O. 1990, c. P.13, as amended

Appellant:	1541179 Ontario Ltd. and Lea Silvestri Investments Ltd. (jointly)
Appellant:	1589805 Ontario Inc.
Appellant:	2140065 Ontario Inc.
Appellant:	2163846 Ontario Inc. and others
Subject:	Proposed Official Plan
Municipality:	Regional Municipality of Waterloo Region
OMB Case No.:	PL110080
OMB File No.:	PL110080

AND IN THE MATTER of a motion initiated by the Ontario Municipal Board pursuant to sections 35, 36, 37, 38, 41 and 88 of the *Ontario Municipal Board Act*, R.S.O. 1990, c O. 28, as amended

Heard: June 4, 2014 in Toronto, Ontario

APPEARANCES:

Parties	**Counsel**
Regional Municipality of Waterloo ("Region")	Brian Duxbury and Ben Jetten
Activa Holdings Inc., 2140065 Ontario Inc., 1589805 Ontario Inc., Stonefield Properties Corp., Northgate Land Corp., Hallman Construction Limited and Gatestone Development Corp. ("Activa Group")	Tom Friedland, Robert Howe and Ian Andres
Mattamy Development Corporation ("Mattamy")	Denise Baker

DECISION DELIVERED BY JOSEPH SNIEZEK AND STEVEN STEFANKO AND ORDER OF THE BOARD

INTRODUCTION

[1] This is a motion brought by the Ontario Municipal Board ("Board"), to itself, to determine whether there was a reasonable apprehension of bias on the part of this panel when we presided over the first phase ("Phase One Hearing") of the appeals to the proposed Region Official Plan and rendered our decision ("Decision") on January 21, 2013.

[2] The Board's authority to proceed in the manner it has determined is found in subsections 41(1) and (2) of the *Ontario Municipal Board Act*. ("OMBA")

HISTORICAL SUMMARY

[3] In order to put this motion in proper historical context, a brief summary of the events leading up to it is in order.

[4] The fundamental issue addressed in the Decision was the amount of land that was required to be added to the Region's urban boundary so as to accommodate population and growth to 2031 as forecasted by the Growth Plan for the Greater Golden Horseshoe ("Growth Plan"). This fundamental issue gave rise to two secondary issues: the amount of land ("Take Outs") to be excluded from the designated greenfield area and which of two land budgets presented should be preferred.

[5] The Region's position prevailed on the issue of Take Outs while the position of Activa Group prevailed on the issue of land budget methodology.

[6] On February 4, 2013, the Region filed a notice of motion ("Leave Motion") for leave to appeal the Decision to the Ontario Divisional Court ("Divisional Court") on the basis of several alleged errors of law. The alleged errors did not include any reference to bias. The Leave Motion has since been adjourned *sine die* pending the outcome of the Region's judicial review application ("JR Application").

[7] On February 20, 2013, the Region filed a request ("s. 43 Request") with the Board for it to review the Decision pursuant to s. 43 of the OMBA again alleging several errors of law. The alleged errors of law did not include bias. The s. 43 Request was dismissed by the Executive Chair of the Board by letter dated March 28, 2013.

[8] On September 9, 2013, the Region commenced its JR Application alleging a breach of natural justice or procedural fairness which led to the Decision due to the presence of a reasonable apprehension of bias on the part of this panel. In that proceeding the Region seeks an order that, *inter alia,* the Decision be quashed or set aside.

[9] On December 18, 2013, counsel to the Board wrote the parties to advise that the Board considered the JR Application to be premature since the Region had not raised its concerns as set out in the JR Application with this panel. The letter also indicated that any such motion brought would be scheduled expeditiously.

[10] On January 13, 2014, counsel to the Region declined the Board's invitation to bring a motion before this panel.

[11] On January 28, 2014, the Board, by notice of prehearing conference commenced proceedings to review the circumstances underlying the Region's bias allegation and on April 2, 2014, issued a decision that this motion be heard on June 4 and 5, 2014.

[12] And finally, on May 6, 2014, the Divisional Court issued a decision dismissing a motion brought by the Region seeking to prohibit the Board from hearing this motion on the basis of an alleged lack of jurisdiction. In his decision, Lederman J. confirmed, among other things, that the issue of bias is to be raised before, and decided by, the panel charged with the responsibility of adjudicating the dispute.

POSITIONS OF THE PARTIES

[13] The Region argues that there was a breach of natural justice or procedural fairness relating to the Phase One Hearing due to the presence of a reasonable

apprehension of bias arising from factual circumstances discovered by the Region after the issuance of the Decision.

[14] Specifically, this apprehension arises from the alleged conflicting roles undertaken by one Jeanette Gillezeau, a land economist.

[15] The conflicting roles of Ms. Gillezeau, according to the Region, relate to her involvement as a co-presenter, along with another land economist, Russell Mathew, at a Board professional development day on April 3, 2012 (“April 3”) and her role as a principal witness for the Activa Group at the Phase One Hearing.

[16] During their presentation (“Presentation”), Mr. Mathew and Ms. Gillezeau (collectively the “Presenters”) dealt with the issues and challenges of the Growth Plan. The Presentation was one of two separate presentations on April 3 and lasted approximately one hour and forty-five minutes. Both Mr. Mathew and Ms. Gillezeau were invited by the Board to speak based on their experience as land economists and as professionals who were experienced with Board proceedings.

[17] It is suggested by the Region that the Phase One Hearing was not fair and a reasonable apprehension of bias existed on the part of this panel since:

(a) One of the primary issues at the Phase One Hearing was the appropriate land budget methodology under the Growth Plan;

(b) The materials relating to the Presentation included a two page example residential land budget under the Growth Plan reflecting a housing by type analysis;

(c) The land budget methodology advocated by Ms. Gillezeau at the Phase One Hearing was accepted by this panel in the Decision; and

(d) No disclosure was made to the Region at the outset of or during the Phase One Hearing that Ms. Gillezeau was one of the Presenters.

[18] The Activa Group, on the other hand, argues that no bias existed for a number of reasons, including:

(a) When Mr. Mathew was first contacted to participate as a Presenter, it was made clear to him that the Presentation was to be general in nature and was not to provide any specific suggestions with respect to Growth Plan matters under appeal.

(b) Ms. Gillezeau was contacted around the same time as Mr. Mathew and was advised that she was being asked to participate to obtain a balanced perspective to the Presentation since she was often retained by private sector clients and Mr. Mathew acted almost exclusively for public sector clients.

(c) After accepting the Board's invitation, Mr. Mathew and Ms. Gillezeau finalized the content and format of their presentation recognizing the need for it to be balanced. The final product is best characterized as Mr. Mathew's presentation prepared with Ms. Gillezeau's input.

(d) Consistent with the preparation of the background materials, Mr. Mathew took the lead and delivered the entire Presentation with Ms. Gillezeau providing additional commentary at appropriate points throughout.

[19] Mattamy did not provide any submissions on this motion.

ANALYSIS AND DISCUSSION

[20] At the outset, let us say that this panel, collectively, has had extensive experience in municipal planning and legal matters, This experience, not only establishes a planning and legal foundation for cases of this type, but also, underscores the ability of this panel to discern that which is meaningful in an educational context and otherwise. The bias allegation being made by the Region calls into question our ability to act impartially notwithstanding these experiences. In assessing the bias allegation,

we will focus our comments on the matters of judicial impartiality as well as the legal test for a reasonable apprehension of bias. When discussing this legal test, we will also comment on Board practices and obligations.

(i) Judicial Impartiality

[21] The starting point in our analysis is to point out and recognize the principle of impartiality. As acknowledged by the Region and Activa Group, it applies to this panel.

[22] The principle itself is well documented. Public confidence in the legal system is embedded in the fundamental conviction that those who are charged with the responsibility of decision-making, must always do so without bias or prejudice and must always be perceived to do so.

[23] The Supreme Court of Canada in *Wewaykum Indian Band v. Canada* [2003] 2 S.C.R. 259 stressed the importance of the principle and pointed out, in clear and concise terms, which party carried the burden of establishing the existence of bias.

[24] In this case, two Aboriginal bands, the Campbell River Band and the Cape Mudge Band, brought motions to set aside a decision of the Supreme Court of Canada ("SCC Decision") written by Binnie J. dismissing their appeals from a decision of the Federal Court of Appeal.

[25] The bands alleged that Binnie J.'s involvement as federal Associate Deputy Minister of Justice in the early stages of the Campbell River Band's claim in 1985 and 1986, gave rise to a reasonable apprehension on his part in relation to the SCC Decision.

[26] At para. 59 of *Wewaykum supra*, the Court stated:

> …the presumption of impartiality carries considerable weight, and the law should not carelessly evoke the possibility of bias in a judge, whose authority depends upon that presumption. Thus while the requirement of judicial impartiality is a stringent one, the burden is on the party arguing for disqualification to establish that the circumstances justify a finding that the judge must be disqualified.

[27] It is our responsibility therefore, to scrutinize the merits of the Region's allegation without carelessly evoking the possibility of bias and at the same time, recognize that the burden is on the Region to establish the requisite circumstances which would justify the finding the Region seeks.

(ii) Legal Test and Board Practices

[28] The test for determining whether a reasonable apprehension of bias exists originates from the dissenting judgement of de Grandpré, J. (cited with approval in *Wewaykum supra*) in *Committee for Justice and Liberty v. Canada (National Energy Board)* [1976] SCJ No 118.

[29] At para. 40 he stated:

> …the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information…that test is "what would an informed person, viewing the matter realistically and practically- and having thought the matter through- conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."

And at para. 41 he went on to say:

> …The grounds for this apprehension must, however, be substantial and I entirely agree with the Federal Court of Appeal which refused to accept the suggestion that the test be related to the "very sensitive and scrupulous conscience."

[30] As the Region has pointed out, and as evidenced by judicial authority, whether the decision was actually biased is irrelevant. In that regard, again, a portion of the *Wewaykum* decision bears repeating. At para. 66 the Court stated:

> …in cases where disqualification is argued, the relevant inquiry is not whether there was, <u>in fact</u> either conscious or unconscious bias on the part of the judge, but whether a reasonable person properly informed would apprehend that there was.

[31] The Region suggests that Ms. Gillezeau's participation at the Presentation and her subsequent attendance at the Phase One Hearing, testifying on behalf of Activa

Group, meet the legal test as enunciated by the Supreme Court of Canada. We do not agree.

[32] Although the Region argues that the Presentation was not generic in nature but rather, specific on the critical issue of land budget methodology, we would note the following:

(a) The hand-out ("Handout") provided at the Presentation included 53 pages of material with the impugned example residential land budget comprising only two of those 53 pages. As was clearly pointed out by Mr. Mathew and Ms. Gillezeau in the affidavits they filed on this motion, nothing in the written material or oral presentation advocated any particular approach to land budgeting or indicated that one approach was preferable to another. In fact, the Handout noted on page 8 that in respect of land budgeting, there were a "variety of approaches and methodologies used." The Handout also specifically mentioned that "Land budget methodology is an issue in most upper-tier Growth Plan conformity and planning appeals."

(b) The Presentation made no reference whatsoever to the Phase One Hearing or the specific issues in dispute in that proceeding.

(c) The land budget methodology of the Region advanced in the Phase One Hearing was, as acknowledged by the parties, novel and unique and unlike the methodology employed by other municipalities subject to the Growth Plan. Accordingly, any perceived disadvantage to the Region arising from the fact that the Region's land budget was unlike the housing by type methodology used elsewhere, would have existed regardless of whether the example residential land budget was included in the Handout.

(d) The degree of specificity in Ms. Gillezeau's testimony at the Phase One Hearing bore no meaningful resemblance to the generic nature of the Presentation, in our view.

(e) The housing by type analysis which comprised a very small part of the Handout, did not, in any way, represent a focal point of the Presentation nor can one reasonably point to it as a theme of the Presentation.

[33] The Board is a specialized independent tribunal which is now part of a cluster of tribunals known as the Environment and Land Tribunals Ontario. A number of statutes govern the Board's administrative and jurisdictional functions including the OMBA and the *Adjudicative Tribunals Accountability, Governance and Appointments Act*, S.O. 2009, c. 33, Sched. 5 ("ATAGAA").

[34] Under the provisions of ATAGAA, the Board is required, pursuant to s. 11 to enter into a memorandum of understanding ("MOU") with the Minister of the Attorney General to deal with certain matters. One of such matters is professional development.

[35] Section 11(2) of ATAGAA stipulates, among other things, that the MOU must address "(c) the recruitment, orientation and training of tribunal members." It is readily apparent therefore, that the Presentation was part of an ongoing statutory obligation of the Board to ensure that its Members receive adequate orientation and training. In fact, it is a practice of the Board to conduct professional development sessions from time to time, relying in part, on external speakers from various disciplines. This ensures that Board Members keep abreast of emerging issues and legislative changes. In our view, professional development is not only a statutory obligation, but an essential part of, and critical to, the Board fulfilling its role as a specialized land use tribunal.

[36] Moreover, the version of the Code of Conduct of the Board which was in place when this panel was appointed to the Board requires members to "maintain currency in the existing law, emerging issues, trends, tribunal and judicial decisions pertaining to the work of the Board." Established Board practices relating to professional development are entirely consistent with this Code of Conduct.

[37] It is also commonly known and accepted that the Board is a custodian or steward of government policy and is charged with the responsibility of acting in the public interest. As a result, deference is shown the Board not only when it makes decisions on

planning matters but also with respect to the issue of bias.

[38] The deference and flexibility shown to tribunals, such as the Board, in relation to the issue of bias was dealt with by the Supreme Court of Canada in *Newfoundland Telephone Co. v. Newfoundland (Public Utilities Board of Commrs),* [1992] S.C.J. No. 21. At para. 27, Cory J. stated:

> Administrative boards that deal with matters of policy will be closely comparable to the boards composed of municipal councillors. For those boards, a strict application of a reasonable apprehension of bias as a test might undermine the very role which has been entrusted them by the legislature.

[39] In this case such deference is a relevant consideration and cannot be overlooked.

[40] If we were to accede to the position of the Region in this case, we would be limiting or ignoring, without appropriate justification, the level of deference customarily afforded tribunals such as the Board and, at the same time, we would be inhibiting the Board's ability to engage in educational processes, from time to time, so that it can properly discharge its statutory and public interest obligations.

[41] Furthermore, we are not persuaded that the involvement of Ms. Gillezeau at the Presentation, and the Presentation itself, support the Region's position in this matter. To conclude otherwise would run counter to the judicial deference afforded the Board and would disparage the intellectual rigor which, in our opinion, is applied to the decision making process.

DISPOSITION

[42] If we accept the submissions of the Region, it is arguable that we would be relating the test for bias to a very sensitive or scrupulous conscience. This however, would be contrary to what was enunciated by de Grandpré J. in *Committee for Justice, supra*, and we therefore, are not prepared to do so.

[43] In the final analysis, we do not believe that in the circumstances of this case, an informed outside observer viewing this matter realistically and practically and having thought the matter through, would think it more likely than not, that this panel was put in a position, however unconsciously or inadvertently, where it could not decide this matter fairly, due to the Presentation.

[44] Accordingly, based on all of the foregoing, as well as the inability of the Region to rebut the presumption of impartiality, we reject the Region's position. We hereby confirm, and it is therefore ordered, that no reasonable apprehension of bias existed and there has been no denial of procedural fairness or natural justice.

"Joseph Sniezek"

JOSEPH SNIEZEK
MEMBER

"Steven Stefanko"

STEVEN STEFANKO
VICE CHAIR